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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA RIOS,

Defendant and Appellant.

H045661

(Santa Cruz County

Super. Ct. No. 17CR06081)

Defendant Joshua Rios was convicted following a jury trial of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),¹ making criminal threats (§ 422), and exhibiting a deadly weapon (§ 417, subd. (a)(1).) Rios admitted that he had suffered a prior serious felony conviction, and was sentenced to 11 years in state prison.

On appeal, Rios argues that the trial court should have stayed his sentence for making criminal threats (§ 422) under section 654. In addition, Rios asserts that the matter should be remanded to the trial court for resentencing in light of the recent amendments to sections 667, subdivision (a) and 1385, subdivision (b), by Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1013, §§ 1-2) (Senate Bill 1393), which grant the court discretion to strike serious felony convictions in the interest of justice.

The Attorney General concedes Rios's arguments and we accept the concession. We remand the matter to the trial court for resentencing.

¹ All further undesignated statutory references are to the Penal Code.

I. STATEMENT OF THE FACTS AND CASE

Y. K., her husband, daughter J., and son M. were in Santa Cruz to drop M. off at college. While her husband was parking the car, K. and her children walked towards a nearby restaurant. On the way there, they heard Rios running and shouting. Before they were able to reach the restaurant, Rios came up to them, and raised his fists toward J. Rios then took a bottle of Jack Daniels out of a bag and moved toward J., saying, “I’m gonna crack your head, I’m gonna crack your head.” K. stepped in front of J. in an attempt to protect her from Rios.

A bystander named Ehab Elsonbati walked over to the group, and Rios left. Rios came back when K.’s husband returned from parking the car. K.’s husband and Elsonbati blocked Rios from coming near K. and the children; Rios left and ran across the street. Elsonbati told police he believed Rios was swinging the bottle with “enough force to either kill someone or seriously hurt them.”

On December 7, 2017, Rios was charged with assault with a deadly weapon by means likely to produce great bodily injury (§ 245, subd. (a)(1); count 1), making criminal threats (§ 422; count 2), and exhibiting a deadly weapon (§ 417, subd. (a)(1); count 3). The information also alleged that Rios had suffered a prior strike conviction and a prior serious felony conviction. (§§ 667, subds. (b)-(i), 667, subd. (a)(1).) On December 15, 2017, a jury found Rios guilty of all of the charges. On March 22, 2018, Rios admitted having suffered a prior serious felony conviction and the trial court found that he had suffered a prior strike conviction. The trial court denied probation and sentenced Rios to state prison for a total term of 11 years, made up of six years for assault with a deadly weapon, and five years to run consecutively for the prior serious felony conviction. The court imposed one year for making criminal threats, and six months for exhibition of a deadly weapon to run concurrent to the prison term, with credit for time served.

Rios filed a timely notice of appeal.

II. DISCUSSION

A. Section 654

Rios argues, and the Attorney General concedes, that the trial court should have stayed his one-year sentence for making criminal threats pursuant to section 654, because the threats were part of the same course of conduct with the same intent as the assault with a deadly weapon.

Section 654, subdivision (a) provides, in pertinent part, “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” Section 654 is intended “to insure that a defendant’s punishment is commensurate with his [or her] culpability.” (*People v. Perez* (1979) 23 Cal.3d 545, 552.) The statute bars multiple punishment for both a single act that violates more than one criminal statute and multiple acts, where those acts comprise an indivisible course of conduct incident to a single criminal objective and intent. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Conversely, where a defendant commits multiple criminal offenses during a single course of conduct, he or she may be separately punished for each offense that he or she committed pursuant to a separate intent and objective. (*People v. Beamon* (1973) 8 Cal.3d 625, 637-639.)

In order to be convicted of making a criminal threat in violation of section 422, a defendant must willfully threaten to commit a crime that will result in great bodily injury to another person with specific intent that the statement be taken as a threat. (*People v. Jackson* (2009) 178 Cal.App.4th 590, 591.) In addition, there must be an immediate prospect of execution of the threat, and the threat must cause the victim to experience reasonable fear under the circumstances. (*Ibid.*)

The crime of assault is “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240; *People v. Navarro* (2013)

212 Cal.App.4th 1336, 1344.) It is unnecessary for any actual injury to occur. (*People v. White* (2015) 241 Cal.App.4th 881, 884.) A violation of section 245, subdivision (a)(1) requires that a defendant use a deadly weapon in the commission of the assault.

Here, Rios's acts of assaulting J. with a deadly weapon and threatening her were the same course of conduct. The evidence at trial showed that Rios held a bottle of Jack Daniels and was swinging it at J., while at the same time threatening that he was going to crack the bottle over her head. The convictions for the two crimes were based on the same acts by Rios. Therefore, the sentence for making criminal threats should have been stayed pursuant to section 654.

B. Senate Bill 1393

On September 30, 2018, after Rios was sentenced in this case, the Governor signed Senate Bill 1393 which, effective January 1, 2019, amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2; See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*.) Rios argues, and the Attorney General agrees, that the amendments to the law apply retroactively to his case, and the matter must be remanded for the trial court to exercise its discretion in determining whether to strike his serious felony enhancement.

Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), “[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date.” (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) Thus, “[t]he *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.” (*People v. Conley* (2016) 63 Cal.4th 646, 657.) “The rule

in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses.” (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.)

Nothing in Senate Bill 1393 suggests any legislative intent that the amendments only apply prospectively. Accordingly, “it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1, 2019.” (*Garcia, supra*, 28 Cal.App.5th at p. 973.)

Rios is entitled to have the trial court exercise its “ ‘informed discretion’ ” in imposing sentence. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) “ ‘A court [that] is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record. [Citation.]’ In such circumstances, [our Supreme Court has] held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ [Citations.]” (*Ibid.*)

The record before us does not clearly indicate that the trial court would have declined to strike Rios’s prior serious felony conviction for sentencing purposes if it had been within the court’s discretion to do so. Accordingly, remand is appropriate in this case to allow the trial court to exercise its discretion as to whether to strike Rios’s prior serious felony convictions.

III. DISPOSITION

The judgment is reversed, and the matter is remanded to the superior court with directions to resentence Rios in light of sections 667 subdivision (a) and 1385 subdivision (b), as amended by Senate Bill 1393. The superior court is also directed to stay any

punishment imposed for Rios's conviction for making criminal threats (§ 422) pursuant to section 654.

Greenwood, P.J.

WE CONCUR:

Premo, J.

Elia, J.

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